United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To be argued by

Howard L. Jacobs

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75-1145

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

-against-

CARLOS PEREZ, a/k/a "Charlie," a/k/a "Fernando,"

Appellant.

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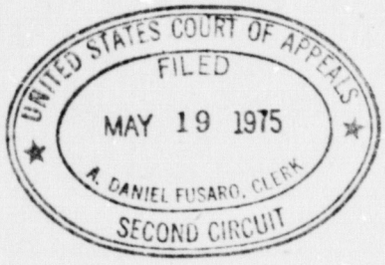
Docket No. 75-1145

BRIEF FOR APPELLANT PEREZ

Appeal From A Judgment of Conviction Rendered In The United States District Court For The Southern District of New York



HOWARD L. JACOBS, P.C.
401 BROADWAY
NEW YORK, NEW YORK 10013
Attorney for 431-3710 Appellant, PEREZ

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STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal by Carlos Perez from a judgment of the United States District Court for the Southern District of New York (The Honorable Charles E. Stewart) rendered April 2, 1975, after a four day jury trial, convicting appellant of the distribution of cocaine in violation of Title 21 United States Code, Sections 812, 841(a), 841(b) (1) (A) and Title 18, United States Code, Section 2.

Appellant Perez was sentenced to three years imprisonment and three years special parole.

STATEMENT OF FACTS

The Proceedings Below

Appellant Perez was indicted in a one count indictment with defendant Aurora Laboy, for the distribution of one ounce of cocaine on March 14, 1974. The trial commenced on February 26, 1975 before Judge Stewart and a jury. On March 6, 1975 the jury found both defendants guilty of the crime charged in the indictment. On April 2, 1975 Judge Stewart sentenced appellant Perez to three years imprisonment and defendant Laboy to two years imprisonment. Both were also sentenced to three years special parole.

The Government's Case

On March 13, 1974 a Government informant Ramon Acevedo met defendant Laboy on 96th Street between Broadway and Amsterdam Avenue. Laboy asked Acevedo if he could use any cocaine. He said he had an Italian customer who might want an ounce or an 1/8th (one-eighth kilo). She said the cocaine would cost $1,200 for an ounce and $4,000 for an eighth. Acevedo said he'd let her know at her apartment (34-39).*

On March 14, at about 3:00 P.M. Acevedo told Agents Robert Nieves and Michael Gray of the Drug Enforcement Administration of his conversation with Miss Laboy. Agent Gray told Acevedo to arrange a meeting with Miss Laboy and to try to get a sample of cocaine. Acevedo went to defendant Laboy's apartment at 514 West 110th Street where she introduced him to appellant. Acevedo told them he had a customer for some cocaine. Appellant told him his people only sold 1/8th but he could also get him an ounce. Appellant gave Acevedo a sample of cocaine in a piece of aluminum foil and told him an ounce would cost $1,200 and an 1/8th $4,000. They agreed to meet back at the apartment at 7:30 P.M. Acevedo gave the sample to Gray (40-45, 246-248).**

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* Refers to pages of the trial transcript.

** It was stipulated that a chemist would testify that the white powder received by Acevedo and Agent Gray was cocaine (366-369).

Shortly before 7:30 P.M. Acevedo was equipped with a Kel transmitter by Agent Nieves. Acevedo and Gray then went to defendant Laboy's apartment. She admitted them and after introductions Laboy asked Gray if he was interested in purchasing an 1/8th. Gray said he was only prepared to buy an ounce. Appellant said he only had an ounce of cocaine which wasn't pure, could take a cut of "1½" and cost $700. After some discussion Agent Gray agreed to pay $700 and appellant got the cocaine from the kitchen. At Agent Gray's request, defendant Laboy got a glass of water and Gray tested the cocaine and weighed it on a scale produced by appellant. Gray said if it was good he's return the next week for an 1/8th. He then gave $700 to Laboy who handed a portion to appellant (45-55, 88-89, 202-206, 251-262A).

Agent Nieves monitored the conversation in the apartment which was transmitted by the Kel transmitter worn by Acevedo. Acevedo and Agents Nieves and Gray all agreed the transcript of the tape recording of the conversation was a fair and accurate representation of the portions of the conversation recorded (57-59, 208, 263-264).

The tape recording of the March 14 meeting was played to the jury twice during the trial and once at their request, during their deliverations. Appellant and defendant Laboy stipulated that the Government's transcript of the tape recording was

a true and accurate translation of Spanish into English (91-92, 95-97, 469-470, Gov. Exhs. A, A1, A2).

On March 15 at approximately 3:00 P.M. Agent Gray encountered defendant Laboy at Broadway and 110th Street. He told her the cocaine was satisfactory and he would be ready to purchase the 1/8th the next week (209, 211-212, 264-266).

On March 20 Laboy called Agent Gray about the purchase of the 1/8th. Gray went to her apartment and told her and appellant that he was ready to purchase the 1/8th. Appellant said it would be pure and cost $4,000. Laboy said it would be ready the next day and gave Gray a sample which she produced from under her blouse. Agent Kiernan Kobell observed appellant, Laboy and another man leave her building after the meeting with Gray. He photographed them in the street and the photographs were admitted into evidence (266-270, 352-361, Exs. B, B1-B5).

On March 21 Agent Gray returned to 514 West 110th Street with $4,000, but defendant Laboy did not answer the bell. He saw appellant and told him he was there to purchase the 1/8th. Appellant said there was no problem. In his car Gray showed appellant the $4,000. Appellant told Gray he'd have Laboy call him as soon as he was able to contact her (277-279, 362-363).

Shortly after this at Laboy's apartment appellant told Acevedo in Laboy's presence that they were afraid Gray was an agent because he had come with $4,000 and didn't know them well

enough to carry $4,000 on his person (55-56).

On April 1, Laboy called Agent Gray and they arranged to meet at the American Restaurant at 69th Street and Broadway at 2:00 P.M. on April 2 to consumate the sale of the 1/8th. On April 2 appellant and Laboy were in the vicinity of the American Restaurant prior to 2:00 P.M. and then left the area. Agent Gray never met with them on that date and never purchased any more cocaine from them (209-211, 280-282).

Shortly thereafter appellant and Laboy told Acevedo they had gone to meet Agent Gray at the American Restaurant but left because they saw a car with three or four agents following them (56-57). On May 7 Agent Gray ran into appellant who told him that he and Laboy left the area of the American Bar on April 2 because they saw police in the area (283-284).

ARGUMENT

THE COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SEVER

On February 26, 1975, prior to the commencement of the trial appellant moved to sever his trial fromthe trial of co-defendant Laboy. The Court reserved decision at that time and proceeded with selection of the jury. The next day the Court

denied the severance motion (2-4).

The ground for the motion was that appellant desired to testify in his own behalf and in doing so he would incriminate defendant Laboy. Prior to trial counsel for defendant Laboy was informed of this. After telling his client of appellant's intentions, Miss Laboy's attorney told appellant through his counsel that if appellant testified and incriminated Laboy, she would change her intention not to testify and would testify and incriminate appellant. Appellant and Laboy joined in the motion to sever. (P3 - 6, 12-13)*

Appellant had never been arrested before, had a good work record and background and had the full intention of testifying until informed that if he incriminated Laboy, she would testify and incriminate him.

Trial counsel advised appellant not to testify because of this problem, but until the last minute he was undecided upon what to do. Only upon proding by the Court did appellant finally state after the Government had rested, that he did not want to testify in his own behalf (370-371).

This was a very difficult decision after a trial in which appellant was faced with two antagonists, the Government and counsel for defendant Laboy who skillfully elicited testimony from Acevedo incriminating appellant and tending to exculpate

*Refers to Pre-Trial Transcript. These pages and pages 2-4 of the trial transcript are reproduced in appellant's appendix.

his client, over the objection of appellant's counsel (117-123, 132-133, 144-146).

While the decision on a motion to sever is within the discretion of the trial judge, United States v Calabro, 467 F. 2d 1973, (2d Cir. 1972) cert denied, 410 U.S. 9,26 (1973), where that discretion is abused this Court should grant a new trial.

Rule 14 of the Federal Rules of Criminal Procedure provides:

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires ..."

The prejudice to appellant by compelling his joint trial with Laboy which in effect caused him to forego his cardinal right to testify in his own behalf is just the type of situation Rule 14 was intended to alleviate. The Court below was apprised of the situation prior to trial and could have directed separate trials one to follow the other.

Appellant was effectively denied the right to testify

and contravert the version of the facts as testified to by the Government witnesses. He was told that if he testified and incriminated defendant Laboy, she would take the witness stand and incriminate appellant with her testimony. The Government could then sit back and watch the two defendants convict each other. In such an extraordinary situation a severance should have been granted.

In United States v Valdes, 262 F. Supp. 474 (D. Puerto Rico 1967) the Court granted a severance to one defendant where it was clear that the defense of the co-defendant was to exculpate himself by incriminating the first defendant. As the Court aptly stated:

> "As counsel for defendant Luis Valdes pointedly remarks, Valdes, if compelled to go to trial together with defendant Vega, would have to prepare his defense against two adversaries, the United States and co-defendant Vega. They would be united in their effort to convict Valdes. We must agree that under these conditions, a joint trial would be the equivalent of a denial of a fair and impartial trial. Hence, separate trials must be provided for these two defendants." 262 F. Supp. at 476.

The anticipated prejudice to appellant bore fruition during the trial when Laboy's attorney elicited answers which

incriminated appellant from Acevedo and appellant's decision not to testify for fear of what Laboy would say in her threatened testimony, thereby giving up a privilege of "inestimable value." United States v Bentvena, 319 F. 2d 916, 943 (2d Cir) cert. denied 375 U.S. 940 (1963).

CONCLUSION

FOR THE FOREGOING REASONS
THE JUDGMENT SHOULD BE
REVERSED AND APPELLANT
GRANTED A NEW TRIAL

Respectfully submitted,

HOWARD L. JACOBS, P.C.
Attorney for Appellant
CARLOS PEREZ
401 Broadway
New York, N.Y. 10013

May 19, 1975.